IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 05-CV-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

REPLY OF STATE OF OKLAHOMA IN SUPPORT OF ITS MOTION *IN LIMINE* PERTAINING TO EVIDENCE OR ARGUMENT PERTAINING TO A TMDL OR THE ABSENCE THEREOF [DKT #2428]

The State of Oklahoma respectfully submits this as its Reply in support of its Motion in Limine Precluding Evidence or Argument Pertaining to a TMDL or the Absence Thereof [Dkt. #2428].

I. Introduction

In its Motion *in Limine* the State demonstrated that a TMDL is a non-self executing planning tool that cannot stop the phosphorus or bacterial pollution from nonpoint sources harming the waters of the IRW and the biota therein. Nor can a TMDL remediate future harm from phosphorus laid down from Defendants' birds for decades. Consequently, the State showed that the Court or jury should not be led to a false belief that a TMDL was an alternative to injunctive relief in this case. Additionally, the State demonstrated that the absence of a TMDL for phosphorus in the IRW was not a matter of any consequence to the issues to be determined in this action. Further, the State demonstrated that the unsupported suggestion of some role by the Attorney General's office in delaying completion of a TMDL for phosphorus in the IRW was both irrelevant and prejudicial, because it was highly likely to mislead the Court or jury.

In their response [Dkt. #2489] Defendants utterly fail to challenge any of the points supporting the State's Motion *in Limine*. Instead, Defendants continue to assert, without foundation, that a TMDL can stop the pollution and remedy the ongoing harm caused by their waste disposal practices, and continue their campaign of unprofessional comments about the Attorney General's office. The Court should grant the State's motion.

II. Defendants fail to demonstrate that a TMDL, or any other administrative measure, could stop the nonpoint source pollution and remedy ongoing harm caused by their disposal of poultry waste.

Defendants attempt to convince the Court that a TMDL, backed up by some Oklahoma administrative process, could stop their nonpoint source pollution and remedy the ongoing harm caused by their waste disposal practices. *See* Dkt. #2489, pp. 7-10. However, Defendants' argument fails. Defendants do not dispute that the ODEQ does not have enforcement authority over *nonpoint or unregulated point sources* in the context of a TMDL. Instead, Defendants claim that ODEQ must "coordinate" with other state environmental agencies, particularly the Oklahoma Department of Agriculture, Food and Forestry (ODAFF) which regulates land application of poultry waste. *See id.* at 8. Defendants' *ipse dixit* suggestion, *see* Dkt. #2489, p. 12, that a TMDL is a more appropriate mechanism "to identify all sources of nutrient loading in the IRW as opposed to the State's litigation model" illustrates the fact that a TMDL may identify sources, which are already known, but not stop the nonpoint pollution it identifies. Defendants do not explain how "coordination" between ODEQ and ODAFF could *eliminate* the nonpoint pollution caused by Defendants' waste disposal practices in Oklahoma. No administrative action by ODAFF would be more effective to stop pollution-causing conduct in Oklahoma than the injunction sought by the State in this case. Consequently, the suggestion of an administrative remedy by ODAFF is illusory.

Moreover, Defendants do not claim, and would reject the suggestion, that ODAFF or any other agency of the State of Oklahoma, can restrain their pollution-causing conduct in the State of Arkansas, where most of the waste generated by their birds is land-applied.[1] Instead, Defendants note that both Oklahoma and Arkansas are working on TMDLs, a fact that does nothing to restrain their improper waste disposal practices, or to remedy the future harm from past phosphorus over application. Defendants offer no authority for the proposition that Arkansas has the legal means to restrain their nonpoint source pollution with an Arkansas TMDL, that Arkansas has the desire or political will to stop that polluting conduct, or that it would do so if it were asked (or commanded) to do so by ODAFF or any agency of the State of Oklahoma. Defendants merely conclude blandly that "the State's concerns regarding enforcement within the borders of Arkansas are wholly without basis," *see* Dkt. #2489, p. 9, *although Defendants never articulate what the State of Oklahoma could do through a TMDL, or any other administrative means, to control their actions in Arkansas.*

While Defendants find the State's demonstration that a TMDL is only a planning process by which the State cannot compel cooperation "unconvincing," *see* Dkt. #2489, p. 10, they cite no authority contradicting the cases relied upon by the State, such as: *Pronsolino, v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002) (TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans) or *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142, 1144 (N.D. Cal. 2003) (TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-

[1] Defendants do not even attempt to argue that a TMDL would remedy harm that will be caused for decades by phosphorus laid down from their birds in the past. Phosphorus from their birds has elevated the STP in the soil where it was applied. For decades some of that phosphorus will run off the application sites to surface water and leach into ground water causing harm.

executing.).[2] A TMDL does not, by itself, prohibit any conduct or require any actions. Defendants do not contradict the fact that TMDLs provide information helpful to states in adjusting point source pollution from NPDES permit holders, but offer no vehicle to control nonpoint pollution:

> For point sources, limitations on pollutant loadings may be implemented through the NPDES permit system. 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA regulations require that effluent limitations in NPDES permits be "consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL. *Id.* For nonpoint sources, limitations on loadings are not subject to a federal nonpoint source permitting program, and therefore any nonpoint source reductions can be enforced against those responsible for the pollution only to the extent that a state institutes such reductions as regulatory requirements pursuant to state authority.

City of Arcadia, 265 F. Supp. 2d at 1145.

Defendants misconstrue the State's position by suggesting the State implies it may follow or disregard the CWA at its discretion. *See* Dkt. #2489, p. 9. The very case relied upon by Defendants shows the CWA does not permit or require states to take regulatory action to limit the amount of non-point water pollution introduced into its waterways. *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1224 (10th Cir. 2005). Further, nothing in the CWA demands or authorizes a state adopt a regulatory system for nonpoint sources. *Id.* The State's actual position is a simple one: a TMDL under the CWA will not stop Defendants' polluting conduct, while an injunction from this Court will. The CWA neither stops nonpoint source pollution nor remediates harm caused by such pollution, nor supplants or prevents the State from seeking, and the Court from granting, injunctive relief to do the job at hand.

[2] Defendants' lengthy recitation of how TMDLs work demonstrates that TMDLs *are* planning tools. Defendants cite no contrary authority showing a TMDL can stop nonpoint source pollution.

Similarly, Defendants do not cite any authority under state law demonstrating what the State can do to compel nonpoint source polluters to comply with a TMDL in either Oklahoma or Arkansas. In fact, the State can do nothing in Arkansas with an Oklahoma TMDL. Defendants cite no authority establishing any Oklahoma administrative authority in Arkansas. Nor do Defendants explain how ODAFF could stop their nonpoint source pollution in Oklahoma, short of seeking the sort of injunctive relief sought in this case. The fact that ODEQ cannot simply "coordinate" interstate nonpoint pollution out of existence with a TMDL renders this case a classic interstate pollution case to be remedied by RCRA and the federal common law of nuisance. Consequently, a suggestion to the Court or jury that a TMDL is an alternative remedy for nonpoint source poultry pollution would be deceptive, and prejudicial in the extreme.

III. Defendants' Attack on the State's "Motivation" for Suit Is Irrelevant and Prejudicial.

Defendants suggest that the State's motivation in bringing this lawsuit is relevant. It is not. The State has brought this action to clean up a once beautiful river. That is its motivation. Defendants' sole reliance on *Pittsley v Warish*, 927 F.2d 3, 10 (1st Cir. 1991), *see* Dkt. #2489, p. 13, is unavailing. In that case the appellate court found no abuse of discretion under Federal Rule of Evidence 404(b) in allowing admission of evidence of a plaintiff's arrest and prosecution by the same police officer she later sued, in order to show her motive for her civil rights suit. This reliance on a specific federal rule of evidence offers no support for questioning the State's motivation for an environmental cleanup case. Defendants present no authority for the proposition that a State's motivation for filing an environmental case is somehow relevant in the case itself.

Defendants' attempt to politicize this case appears clearly in their assertion, unsupported by any fact or evidence, that the TMDL process has been thwarted by the State for reasons

including this litigation. Similarly, Defendants falsely assert "the Attorney General's efforts to impede on this purely regulatory process created by the EPA under the CWA with his litigation" is probative and calls into question the validity of the State's evidence. *See* Dkt. #2489, p. 14. First, the Attorney General has not tried to "impede" on the TMDL process, and the allegation that he has done so is pure innuendo. Consequently, it is probative of nothing, and the suggestion of improper influence in the completion of a TMDL is without foundation and prejudicial. Moreover, the fact that the State has hired two separate modelers to prepare a TMDL, *see* Dkt. #2498, p. 14, has nothing to do with the issues in this case, and, if anything, shows the efforts of the State to complete a proper TMDL. Second, an order of the Court prohibiting such innuendo or improper comment about the absence of a TMDL does not prevent either the State or Defendants from introducing *relevant* evidence about the conditions of the waters in the IRW.

In the present motion the State merely asks the Court to prohibit evidence or argument (1) falsely suggesting that a TMDL can control nonpoint pollution (when it cannot) and (2) speculating about the reason for delay of completion of a TMDL for the IRW, and particularly falsely accusing the Attorney General's office of a role in that delay. Such evidence is irrelevant and prejudicial. The present motion does not seek to bar relevant evidence about conditions in the IRW or the results of modeling of the watershed, as distinguished from a TMDL as a remedy, or from claims of delay in completion of a TMDL. The reliability of the evidence of the parties — both the State and Defendants — must stand on its own, and is completely unrelated to the existence or non-existence of a TMDL for this Watershed.

Defendants' overheated rhetoric about imagined attempts to limit evidence about the elemental facts of the IRW is simply beside the point.[3]

IV. Conclusion

Defendants would clearly like to continue their conduct while Oklahoma regulatory agencies try to "coordinate" a remedy among themselves and, impossibly, across the border into Arkansas. The State is not asking the Court to "constitute a judicial TMDL," but to use its authority under RCRA, Oklahoma statutes (for conduct in Oklahoma) and state and federal common law to stop nonpoint source pollution originating with Defendants' birds. Additionally, the State is asking the Court to order effective abatement and remediation for phosphorus laid down from Defendants' birds for decades because that phosphorus will continue to pollute Oklahoma's waters for decades to come. No TMDL can do these crucial jobs, and suggesting the contrary is an act of deception. The Court should forbid Defendants from suggesting at trial that a TMDL is a remedy for their nonpoint source pollution or that the absence of a TMDL is the fault of the State or of the Attorney General's office.

[3] The State has separately moved *in limine* to limit testimony and evidence about other sources of pollution in the IRW *for purposes of arguing that joint and several liability does not apply*, *see* Dkt. #2436. The State recognizes, as did this Court in *City of Tulsa v. Tyson*, 258 F. Supp. 2d 1263, 1302 (N.D. Okla. 2003)(vacated in connection with settlement), that evidence of other sources of phosphorus could be relevant to prove "want of causation." Given the overwhelming evidence that phosphorus from Defendants' birds has polluted the waters of the IRW, Defendants cannot prove "want of causation" through evidence of other phosphorus sources in the IRW.

Respectfully Submitted,

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